IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO. 283 OF 1999

Smt. Ushadevi Munna Upadhyay]
aged about 36 years,housewife]
permanent resident of :-]
Room No.38, Adarsanagar No.1,]
Maharashtra Housing Board,] Appellant/
Linking Road, Jogeshwari (W)] ori.accused
] No.1

versus

01. The Senior Inspector of]
Police, Malad Police Stn.] Original
Mumbai - 400 064] complainant

02. State of Maharashtra]
C/of The Public Prosecutor]
High Court, Mumbai.] Respondent

Shri J.N. Shetty, Advocate for appellant.
Smt. Usha Kejariwal, APP for Respondents.

W I T H

CRIMINAL APPEAL NO.324 OF 1999

01. Laxman Indersingh Rawat]
R/o Dindayal Upadhayay Nagar,]
MIDC Road No.19, Andheri (W)]
Mumbai - 400 093.]

02. Mahadeo @ Pinto Baburao Kamble]
R/of Dindayal Upadhaya Nagar,]
MIDC Road No.19,Andheri (W)]
Mumbai - 400093]

03. Natvarlal Kanhyalal Jaiswal]
R/of Dindayal Upadhayay Nagar,]
Near Rationing Shop, MIDC Rd.] Appellants/
No.19, Andheri (East),] orig.accused
Mumbai - 400 093/] Nos.2,3, & 6.

versus

The State of Maharashtra]
(at the instance of Malad]

Police Station in Cr.No.]
421 of 1997).]

Shri M. J. Bhat, Advocate for appellant No. 1.
Smt. Anjali Patil,Advocate for appellant Nos.2 & 3.
Smt.Usha Kejariwal, APP for the Respondent-State.

Coram : N.V. DABHOLKAR &
SMT.V.K. TAHILRAMANI, JJ.

Reserved on : 10.02.2006
Pronounced on : 03.03.2006

JUDGMENT (Per: Dabholkar, J.)

1. Both these appeals by original accused persons challenge the judgment and order in Sessions Case No.1257 of 1997, dated 10.2.1999, delivered by Additional Sessions Judge, Greater Bombay. By the impugned judgment, all appellants are held guilty for offence punishable under Section 302 read with 34 of

Indian Penal Code, in connection with C.R. No.421 of 1997 of Malad Police Station. All of them are sentenced to life imprisonment (rigorous), fine of Rs.5000/- each, in default, further rigorous imprisonment for three months. They are given set off, to the extent of under-trial prison.

2. According to the prosecution story, the incident in question is said to have taken place on 20.8.1997 at about 23.40 hours, at a location in front of Sri Lanka Zopadpatti, Malad (West). The victim of the incident was one Rajivkumar Bhattacharya. The victim was brother-in-law of one Anupkumar Das.

. As is evident from the charge, Anupkumar Das was the 5th accused in the case. However, he expired before framing charge and, therefore, charge is framed only against four accused i.e. appellants in the two appeals, but by reference to participation of said Anupkumar Das.

. All five accused, including the deceased, are said to have conspired and committed murder of deceased Rajivkumar, in furtherance of common object of the conspiracy. In addition to charge under Section 302

read with section 120-B of IPC, accused were also charged for offence punishable under Section 302 read with 34 IPC, in the alternative.

. The deceased Anupkumar was in the employment of Air India, in its computer department and was also dealing in sale-purchase of immovable properties. Ranu, sister of victim, was serving with Damaniya shipping and deceased Anupkumar desired to marry her. It is said that Ranu was not willing to marry Anupkumar and hence, he indulged into pressure tactics, by managing to lodge some false complaints against Ranu and her brother, through his trusted friends (PW-8 Madhukar Shinde and PW-10 Sanjay Shelar), in the courts of Metropolitan Mangistrates. Raju Iyer was servant of said Anupkumar. Ultimately, intervention of PW-8 Shinde brought amicable settlement between Anupkumar and Ranu and the couple got married on 23.10.1996 on certain conditions, including that, Ranu would not cohabit with Anupkumar for initial period of six months, after the marriage.

. On 25.12.1996, Anupkumar filed a report with D.N.Nagar Police Station against Ranu, that she had eloped with cash worth Rs.15,00,000/- and gold ornaments worth Rs. 5,00,000/=. A publication to that effect was

also placed in circulation through local English dailies. It is said that the deceased Rajivkumar remained faithful to Anupkumar in searching Ranu. It is said that, Anupkumar was nurturing doubts against Rajivkumar, under the belief that he had helped Ranu to elope and also reported against Rajivkumar to CBI, resulting into a raid. The alleged incident is said to be execution of plan of Anupkumar to eliminate victim Rajivkumar.

. Services of contract killers were utilised through servant Raju Iyer. At the request of Raju Iyer, accused No.1 Ushadevi, a self proclaimed social worker, agreed to work out the plan for a consideration of Rs.2,00,000/= towards which, earnest of Rs.1,00,000/= was paid to her. It is the prosecution story that Raju Iyer and accused No.1 Ushadevi, took the victim Rajivkumar in Tata Siera, bearing registration No.MH-01/R-3166, to the location, near Sri Lanka Zopadpatti, where accused Nos.2 to 4 were waiting. They were given lift in the vehicle, whereafter accused Nos. 1 to 4 stabbed Rajivkumar with knives at about 23.40 hours on 28.8.1997.

. It appears that the police machinery learnt

about the incident by an accident. PW-1 Amroj, who was on duty as driver of police jeep No.MH-01/M721 (Peter-1), attached to Malad Police Station, accompanied by gunman Chandrakant Tambe (PW-2), on the night of 20.8.1997, had been to the residence of PI Shri Patil, in order to reach Shri Patil home, and at the material time, while two were returning to Malad Police Station by link road, while near China link building, Malad (West) at about 23.05 hours, PW-1 Amroj saw three persons running and boarding a stationery rickshaw, near a scrap shop. They were followed by a woman, who also boarded the said rickshaw. Somehow, PW-1 Amroj suspected this situation. As there was a road divider, he took U turn and stopped his vehicle near the rickshaw. PW Nos.1 and 2 noticed that clothes worn by three boys and the woman, were stained with human blood. Upon enquiries, with some firmness in the voice, one of the three boys narrated that they had stabbed a person in the area nearby the bridge, at the instruction of the said woman. It is said that the said boy guided the two policemen to the location. Three boys, the woman, the rickshaw driver and PWs 1 and 2, proceeded to link road bridge, the location was pointed out by the boys. Tata Siera bearing registration No.MH-01/R-3166 was standing there. One person was seen lying behind the said

vehicle in injured condition. PW-1 enquired the victim, who disclosed his name as Rajiv Bhattacharya. The victim also pointed towards woman and three boys (accused Nos. 1 to 4), as his assailants.

. PW-1 Amroj contacted wireless control room and sought assistance. Within short time, wireless mobile, Malad-I, arrived on the scene and injured was shifted to Bhagwati hospital, Borivali, in the said vehicle. PW-1 Amroj and PW-2 Chandrakant, returned to Malad Police Station with the rickshaw driver and the four passengers. As PW-1 Amroj learnt, by message of wireless that injured Rajivkumar succumbed to the injuries in the hospital, he rushed to Bhagwati hospital. PSI Wanjale (PW-23) recorded statement of Amroj at Bhagwati (Exh.11), which was treated as FIR.

. It was PSI Wanjale, who, upon receipt of wireless message from PW-1, had proceeded to the spot, where he learnt that the injured was taken to Bhagwati Hospital and hence, he reached the said hospital. By that time, doctors had examined the injured and he was declared dead. While registering the complaint (Exh.11) of PW-1 Amroj, PSI Wanjale learnt name of the deceased to be Rajivkumar Bhattacharya. Shri Wanjale drew

inquest in presence of couple of panchas, including Mahesh (PW-19). While drawing inquest (Exh.40), several other articles found on the deceased, were seized. Thereafter, Wanjale proceeded to spot, along with PW-1 Amroj and learnt that API Farande (PW-24) had completed the proceedings of spot panchanama.

. At the police station, all four accused were interrogated, blood stained clothes worn by accused were seized under panchanama (Exh.37) drawn in presence of Sangita (PW-18). During interrogation, accused No.1 Ushadevi disclosed that, an amount of Rs.1,00,000/= was kept concealed by her at home and showed willingness to point out the same. After recording memorandum to that effect (Exh.38), police, along with panchas, proceeded to the residence of accused No. 1, where she gave out cash of Rs.1,00,000/= from a steel cupboard. Those were ten bundles of 100 pieces of Rs.100/- denomination each. The cash was attached, by drawing a panchanama, by PSI Chandrakant Bangar (PW-25).

. After being sent by the police, dead body was subjected to post mortem by Dr.Shivaji Kachare (PW-22), on 23.8.1997. In the post mortem notes (Exh.60)

prepared by him, Dr.Kachare opined that, the death was caused by **shock due to haemorrhage due to stab injury.** It was unfortunate that nobody claimed the dead body and, therefore, police constable Shri H.V.Rajam (PW-14) performed funeral of the same on 12.9.1997.

. After completing investigation, including recording of statements of various witnesses, charge sheet was filed in the court of Additional Chief Metropolitan Magistrate, 24th Court, Borivali, by PI Shantaram Sagre (PW-27) on 15.11.1997. Apart from four convicted appellants, Anupkumar Das and Munna Chauthi Upadhyay, were also shown as co-accused persons in the charge-sheet.

3. The prosecution has in all examined 27 witnesses, and for the sake of convenient consideration, they can be referred to in groups as follows.

. PW-1 Amroj D’Souza, the driver of the police jeep, is the main witness, who, by chance; apprehended all four accused, on suspicion. His evidence is important, because he claims that the accused had shown him the spot and the injured, and the injured having confirmed the four accused being the assailants. PW-2

Chandrakant was gunman and accompanied with PW-1, when they were on the trip to reach PI Patil, home. PW-3 Chhotelal Verma is the rickshaw driver. The accused were in the process of boarding his rickshaw, when they were apprehended by PWs 1 and 2. Consequently, Chandrakant and Chhotelal provided evidence about the same part of the prosecution story, i.e. apprehension of accused, of their showing the victim and the place of occurrence and oral dying declaration by the victim. PW-4 Mahendrakumar and PW-5 Bhaskar are also police personnel. On the night in question, they were on duty with mobile police vehicle called, " Malad Mobile-I" and "Malad Mobile-II". These are the vehicles convulsed at the location, upon request by PW-1 for assistance through wireless channel. Malad Mobile-I was used for shifting the injured to Bhagwati hospital, Borivali. PW-5 Bhaskar later on, had shown the spot to officers Shri Wanjale and Farande.

. PW-7 Ajay Dinkar David is the income-tax consultant of Anupkumar Das. Eventually, on 20.8.1997, he was in the company of said Anupkumar and at his request, and had a discussion with Anupkumar regarding CBI matter, which Anupkumar was facing. After initial discussion at hotel Regency at Andheri, when one more

friend of Anupkumar, namely, Mr. Oza, was in company, only two of them (PW-7 and Anupkumar) proceeded to hotel Wong. However, instead of directly proceeding to hotel, Anupkumar diverted to his residence at Mittal park. Anupkumar enquired about his servant Raju, with the watchman and learnt that Raju had still not returned. When the couple (Anupkumar and PW-7 Ajay David) turned back for going to hotel, servant Raju met them at a distance of about 100 yards, and Anupkumar sought confirmation from Raju that the job was completed (----------). Thereafter, Raju also accompanied them to hotel Wong, but occupied a seat in the dining hall, away from these two. At the insistence of Anupkumar, PW-7 halted at the residence of Anupkumar on that night, since it was about 2.30 or 3.00 a.m. by the time they left the hotel. PW-7 was shocked, when they were woken up in the morning at 7.30 a.m. by police, who informed Anupkumar about murder of Rajivkumar, and were making enquiries with Anupkumar.

. PW-15 Rajeshkumar was the watchman at Mittal park on that night. He confirms return of Anupkumar along with servant Raju and one friend (PW-7) at about 3.00 a.m. on the night between 20th and 21st August, 1997. He also states that the victim Rajivkumar was

also staying with Anupkumar.

. PW-18 Sangita Manjal is a panch witness. Her evidence is important, because it is the claim of the prosecution that cash of Rs.1,00,000/= was discovered at the instance of information given by accused No.1 and Sangita is witness to drawing of memorandum and panchanama of these events, which are at Exhibit 38. Panchanama (Exh.37), regarding seizure of blood stained clothes of four accused persons was also drawn in her presence.

. There are two Medical Officers on record. PW-16 Shashikala Nadkarni was on duty at Bhagwati hospital, who had examined the victim and declared him dead. PW-22 Dr.Shivaji Kachare had carried out post mortem. The report is at Exhibit 60 and he has opined that the death was **due to shock due to haemorrhage due to multiple stab injuries.**

. PW-19 Mahesh Desai is the panch witness, who attended the inquest on dead body (Exh.40). PW-20 Nadar Harijan, as a panch witness, has attended the proceedings of drawing of spot panchanama, which is at Exh. 41. Narendra Dhemre (PW-17), at the request of

Investigating Officer, has drawn sketch of the location, which is at Exhibit 34. The witness is head draftsman at the office of civil defence.

. There is a team of seven witnesses, which gave the background history of Anupkumar Das (deceased accused), who had performed marriage with Ranu (sister of the victim Rajivkumar). PW-6 Mohammd Salim and PW-11 Vijaya Shah, are the persons with whom, the deceased was staying, as paying guest for some period. He was paying guest with PW-6 from November 1995 to June 1996, and Mohammad Salim has identified the victim on the basis of photograph shown to him, by PI Sakhare. According to deposition of Vijaya Shah, deceased was staying with her from 10.6.1997 till the date of elopement by his sister. (In all probability, it must be from June-1996 and not June-1997, because the sister is said to have eloped in December-1996 as per the deposition of PW-8 Madhukar and the incident in question has taken place on 20.8.1997).

. According to deposition of PW-9 Amit Thorat, he had cordial relations with Anupkumar and had attended the wedding of Anupkumr with Ranu and had also assisted the police in search of Ranu, when she eloped. He had identified the victim, on the basis of photograph shown

to him by the police. According to him, Tata Siera was being used and driven by the victim and on one occasion, the victim had complained him that Anupkumar was treating him worst than a servant. PW-13 Rakeshkumar was colleague of the victim, while the victim was serving with A & M Communications Private Limited. The victim had maintained relations with PW-13, although the victim had left that company. The victim thereafter had represented to this witness that he had joined Motorola company and that he was also doing course of business management, by seeking admission to N.M.College. He had seen the victim using different cars, including Tata Siera. Having thick relations with Anupkumar, PW-10 Sanjay was knowing Ranu, as also the victim. PW-10 admits to have lodged a complaint in Girgaon court against Ranu, her brother and mother, in May 1996 which was disposed off by compromise in November, 1996.

. PW-8 Madhukar is employed as Senior Manager (Security) with Air India and, therefore, he was knowing Anupkumar, who was also employee of Air India. According to Madhukar, Anupkumar was working as computer engineer. Anupkumar was suspended in July 1994, because there was a raid on him and he was taken in custody by department of revenue intelligence. Madhukar had played

a role of mediator in settling marriage of Anupkumar with Ranu. This was after Anupkumar informed him, of being in love with Ranu. According to Madhukar, Ranu's mother and brother were not in favour of this relation, as was learnt by him, when himself and his wife met Ranu and conveyed her, wishes of Anupkumar. Madhukar also confirms that Anupkumar adopted pressure tactics, by filing false complaints in the court, through some one. Anupkumar had also managed removal of Ranu from company, by writing to the management. He had conveyed Ranu's wishes to Anupkumar that she was unwilling to marry Anupkumar and she had requested him (Anupkumar) to refrain from harassing her and leave her alone.

. Madhukar had arranged a meeting between Anupkumar and Ranu and in that meeting, some agreement was arrived at, Ranu had agreed to marry Anupkumar after payment by him of Rs.10,00,000/= and assurance that all prosecutions would be withdrawn and no more would be filed. It is said that as per this agreement, Ranu was not to resume cohabitation for six months from the date of solemnization of marriage and she would be paid another amount of Rs.5,00,000/= by way of compensation for the harassment, to which she was subjected.

According to Madhukar, Anupkumar and Ranu married on 23.10.1996. The agreement, although signed on 21.6.1996, Anupkumar had predated it as 2.6.1996. On 5.12.1996, there was a quarrel between the couple, and on 11.12.1996, Madhukar was required to accompany Anupkumar to D.N.Nagar Police Station, for lodging missing report about Ranu. After this, Madhukar showed inclination to detach his relations with Anupkumar and he was required to face prosecution, as also arrest on 5.6.1997, on the basis of complaint filed by Anupkumar. PW-12 Subhash Budhwal is the marriage registrar, before whom registration of marriage of Anupkumar and Ranu took place.

. PW-18 Hemantkumar, a police constable of Malad Police Station, was required to perform cremation of dead body of Rajivkumar on 12.9.1997, as no one claimed dead body. PW-23 Ashok Wanjale, PSI, PW-24 Laxman Farande, API, PW-25 Chandrakant Bangar, PSI, PW-26 Madhukar Kurne, PI and PW-27 Shantaram Sagre, PI, are the officers then attached to Malad Police Station, who had participated in the investigation of the case at different stages.

4. Exhibits 46, 48, 50, 52, 54 and 57, are the

reports from the Chemical Analyzer, of the articles forwarded along with forwarding letters at Exhibits 45, 47, 49, 51, 53, 55 and 56. The purport of the reports can be described as follows.

. The two knives, articles 3 and 4, are stained with human blood of group B. Articles 5,6,7 i.e. shirt, full pant and jangia of the victim are also stained with human blood of group B. Articles 9 and 10 i.e. Sari and blouse are clothes of accused No.1. Similarly, articles 11 and 12 are clothes of accused No. 2, article Nos.13, 14 and 15 that of accused No.3, and 16,17 and 18 that of accused No.4. Articles 9 and 10 of accused No.1, article 12 of accused No.2, articles 13 and 15 of accused No.3, and 16 and 18 of accused No. 4, are stained with human blood of group B i.e. the same blood group as that of the victim. Reports at Exhibits 48, 50, 52 and 54 demonstrate that accused Nos. 3, 1, 2 and 4 are individuals of blood group O, A, B and A respectively. Exhibit 57 is the report, regarding analysis of blood of the victim for the purpose of detection of alcohol and no ethyl alcohol is detected, nor any other poisons were traced in the blood. This report should confirm that the deceased was not drunk at the material time, nor any poison had entered his blood.

. Statement of PW 1 Amroj purportedly recorded by PSI Wanjale is treated as FIR (Exh.11). The defence has raised a controversy around this Exhibit 11 by contending that what message Amroj gave on wireless channel was the FIR and, thus, prosecution has suppressed the FIR from the Court. By referring to proforma FIR, which is also filed as part and parcel of Exhibit 11, further challenges are posed because of existence of name of Raju as wanted accused person in column no.8. Exhibit 34 is sketch of the location drawn by head draughtsman in civil defence i.e. PW 17 Narendra. Exhibit 37 is the panchanama regarding seizure of the clothes of accused persons at Malad Police Station. This was drawn between 03-00 to 03-20 hours of 21.8.1997. Under Exhibit 38 collectively is memorandum regarding statement of accused no.1 Ushabai and panchanama regarding discovery of cash Rs.1,00,000/- from her residence at her instance. These proceedings are recorded to have taken place between 03-10 to 03-35 hours and 04-10 to 04-30 hours. For proving both these documents, services of PW 18 Sangita are utilised. Exhibit 40 is inquest of the dead body drawn at Bhagwati Hospital, Boriwali between 01-30 hours to 02-30 hours. It was proved by panch Mahesh (PW 19). The clothes and

other belongings in the pockets of the victim appear to have been seized under this panchanama. This is probably least controverted document on record. Spot panchanama (Exh.41) is proved by panch Nadar. It was drawn between 01-15 to 02-30 hours of 21.8.1997. Post mortem notes prepared by Dr.Shivaji Kachare (PW 22) are at Exhibit 60. The post mortem was performed between 16-00 to 17-00 hours of 21.8.1997.

. Other documents on record such as marriage certificate regarding registration of marriage of Anupkumar Das (deceased accused) with Ranu (sister of the victim) or the agreements of paying guest executed in favour of the hosts by the victim are not of much significance. Evidence of PW 6 Mohd.Siddiqui and PW 11 Vijaya Shaha would have been necessary had the identity of victim not been established by belongings on his person recovered at the hospital.

5. The defence of all the accused is of total denial. All of them claimed that police have picked them up from their respective residences in the early morning hours of 21.8.1997. They were detained at Malad Police Station, without assigning any reason for detention and when their relatives contacted the police

station, they were asked to contact on 23.8.1997 in the court. All of them claimed that, clothes allegedly seized from them, are not their clothes. In addition, accused No.1 denied recovery of cash of Rs.1,00,000/= at her instance and she categorically claimed that the amount does not belong to her. All accused thus, claimed that they are innocent and implicated in a false case.

6. By taking into consideration evidence of PWs. 1,2,3, as also PWs. 6,7,8, 9 and 11, who were the persons having acquaintance with the deceased Rajivkumar Bhattacharya, who confirmed identity of the deceased as such, so also the documents found on the person of the deceased, such as, credit cards of the bank, hotel and customer club identity card, the trial court held that the identity of the deceased as Rajivkumar Bhattacharaya stands established. It is evident from the inquest (Exh.40) that the driving licence, three credit cards of Standard Chartered bank and customer club card of hotel Oberoi, so also identity card with photograph, of N.M. Institute of Management Studies, of the year 1996, were recovered in the bag of the victim. Relying upon evidence of Medical Officer Shashikala (PW-16), inquest (Exh.40) and Dr. Shivaji Kachare (Exh.22), which

indicated that the deceased had suffered multiple stab injures, as many as 44, learned Judge arrived at a conclusion that Rajivkumar died unnatural death on the night of 20.8.1997.

. It appears that the prosecution side, while arguing the matter before the trial court, has placed reliance on the following circumstances, as established beyond reasonable doubts, in order to persuade the trial court to believe that the four accused, in furtherance of their common intention, committed murder of victim Rajivkumar and those are enlisted in paragraph 21 of the judgment, as follows;

(i) Dying declaration.

(ii) Injured being pointed out by accused persons to PW-1 Amroj.

(iii) Clothes of accused persons being stained with human blood of group B.

(iv) Attempt on the part of accused to run away from the scene of occurrence, and

(v) Discovery of Rs.1,00,000/= at the instance of and from the residence of accused No. 1.

The trial judge has also enlisted the challenges raised by the defence, in the said paragraph 21.

. In paragraphs 25 to 31, learned trial judge has

mainly discussed the medical evidence, for the purpose of dealing with the challenge on the part of the defence that the victim could not have been alive by the time, PWs 1, 2 and 3 approached him. The learned Judge has tried to fix the time of the death, on the basis of medical evidence and science pertaining to temperature of the body and process of its cooling after the death, factors affecting such cooling process succeeding the death, for the purpose. The learned Judge rejected the argument that larynx and / or lungs were so much damaged that the deceased could not have been in a position to speak. He has also observed that the post mortem notes gave no indication of damage to vocal chords. Ultimately, learned Judge observed that the injuries were not such that the death could have been instantaneous. By relying upon evidence of PWs 1 to 3, the Judge arrived at a conclusion that the injured was, in deed, alive up to 11.45 p.m. Learned Judge was not inclined to give much importance to the variance between depositions of PWs. 1 and 2 as to whether the injured spoke in Marathi or Hindi. The trial judge was of the view that the short length of the dying declaration, was a guarantee of its truthfulness. Discussing the evidence of PWs. 1 to 3 at length in paragraph 36 to 38, learned Judge recorded that subsequent conduct of

PW-1 inspired the confidence about his version, three witnesses were reliable and, therefore, their version regarding oral dying declaration of the victim will have to be accepted. In the process, learned Judge felt that registration number of rickshaw described by PW Nos. 1 and 2, to be MH-02/U-5062, instead of correct registration No.MH-02/U5065, was an insignificant error.

. It was the challenge of the defence that the statement of PW-1 Amroj, recorded at Bhagwati Hospital (Exh.11), was not the FIR, but the wireless message given by him, was the FIR. This aspect is dealt with by learned Judge in paragraphs 39 to 43. The learned Judge arrived at a conclusion that the wireless message could not have been treated as FIR, because till then it was not confirmed whether any crime has really taken place, because the same did not indicate either names of assailants, or that of the injured. It was a message, simply seeking assistance of police staff in emergent situation. In the process, the learned Judge also repelled the argument of the defence that there was delay in despatching the FIR to the 24th Court of Metropolitan Magistrate (para 40).

. For the reasons discussed in paragraphs 44 and

45, the trial court held that the timings of panchanamas (Exh.37 and 38) overlapping, was sufficiently explained by the deposition of PW-23 Wanjale, who narrated that the memorandum part of discovery panchanama (Exh.38) and panchanama of seizure of clothes of the accused (Exh.37) were simultaneously written by PW-25 Chandrakant and PW-23 Wanjale himself.

. For the reasons discussed in paragraphs 46 to 49, the trial court has accepted the evidence regarding discovery of cash of Rs.1,00,000/= at the instance and from the residence of accused No.1 Ushadevi.

. In paras 50 and 51 of the judgment, the learned trial Judge has dealt with the submission of defence counsel regarding wrappers of different Muddemal articles bearing signatures of different panchas i.e. of the panchas, who were not witnesses to the panchanama, under which the particular article was seized and has observed that these mistakes regarding signatures on the wrappers are required to be overlooked in the light of other overwhelming evidence.

. Although PW 20 Nadar, panch witness to

panchanama of the spot had contradicted the contents of panchanama by saying that samples of blood were taken in the bottles as against reference in the panchanama that those were taken on tissue papers, learned Judge referred to the evidence of PW 1 Uday Bange, Assistant Chemical Analyser from Mumbai and taking into account that items received by him are correctly marked as referred in the panchanama, has ignored the error committed by panch Nadar. Trial Court took a note of the fact that the blood sample of the victim was taken on 23.8.1997 in a bottle for its examination about alcohol contents and although it was sent to Chemical Analyser only on 20.11.1998, after the commencement of the trial and, therefore, the results were inconclusive, it was dereliction on the part of Medical Officer in not sending the blood sample promptly to the forensic science laboratory, the learned Judge accepted the blood grouping of the victim as B on the basis of blood grouping of the blood stains on the apparel of the deceased. For the reasons discussed in paras 52 to 54, the learned Judge seems to have accepted reports of chemical analysis as admissible piece of evidence in the light of Section 293 of Cr.P.C.

. Finding that evidence of PW 7 David, income tax consultant of Anupkumar Das and watchman Rajeshkumar (PW 15) was inadequate to establish conspiracy between accused nos.1 to 4 on one hand and deceased accused no.5 (Anupkumar), the trial Judge has held four appellants guilty of murder of Rajivkumar Bhattacharya in furtherance of common intention i.e. guilty u/s 302 r/w 34 of IPC and sentenced them to rigorous imprisonment for life, fine of Rs.5,000/- each, in default further R.I. for 3 months.

7. So far as challenges raised by the three learned counsel representing four appellants, we can not avoid saying so that the lawyers found it difficult to comprehend the grounds of attack against the impugned judgment. One may not be in a position to deny that this was the result of lengthy cross examinations of almost all the witnesses. For instance, chief examination of Amroj running into four pages was tested by cross examination running into 12 pages. Chief examination of PW 2 Chandrakant running into 3 and a quarter pages was tested by cross examination running into 7 and half pages. PW 3 Chhotelal was comparatively lucky. His chief examination and cross examination, both are about 3 pages each. The unique feature of the

case is that Assistant Chemical Analyser was put in the witness box as PW 21 and after chief examination running into 6 and half pages, he was subjected to cross examination running into 8 and half pages. The details are furnished just to demonstrate that the oral evidence is bulky and that is the reason why the learned counsel found it difficult to comprehend their submissions. They were advancing some points even while reading the evidence and they advanced some submissions after completion of reading of the evidence. We have sincerely and strenuously tried to pick up all possible challenges raised by them. The arguments, which started on 25.1.2006 concluded only on 10.2.2006, although daily afternoon session of two hours was devoted to hearing these two appeals together on all working days in between.

. In order to make an attempt to keep the length of the judgment under control, we have avoided to reproduce the submissions at a stretch and we shall refer to those while recording our reasons either for accepting or rejecting those. Learned counsel have collected all possible deficiencies, which according to them, strike at the circumstances relied upon by the prosecution in this case based on circumstantial

evidence. By collective effect of those, they have tried to persuade us to disbelieve following circumstances.

(1) Apprehension of accused persons at 23-45 hours of 20.8.1997;

(2) Pointing out injured by accused;

(3) Oral dying declaration of victim Rajivkumar;

(4) Clothes of accused persons being stained with human blood of group B;

(5) Discovery of Rs.1,00,000/- at the instance of accused no.1.

. Thus, it is the submission of learned counsel that prosecution has not established complete chain of circumstances linking the accused persons to the killing of Rajivkumar Bhattacharya beyond all reasonable doubts and leaving no other hypothesis open, except the guilt of the accused. While arguing their own points, all counsel have expressed adoption of the points argued by other counsel for remaining appellants.

8. Initially, we intend to deal with some, comparatively minor points, which do not need lengthy discussion.

. It was urged that the evidence of PW 3 Chhotelal (rickshaw driver) so far as identification of the accused persons is not acceptable, because no test identification parade was held. We may point out that the incident occurred on the night between 20th and 21st August, 1997. Recording of evidence appears to have commenced on 9.11.1998 and evidence of PW Chhotelal is recorded on 11.11.1998. Thus, this is not a case where witness was required to stretch his memory to an event, which was 5 or 10 years old, as unfortunately happens now-a-days due to piles of pendency. More over, from the deposition of Chhotelal, which we are likely to reproduce at later stage to a considerable extent, it is evident that Chhotelal had an opportunity to be in company with the accused persons nearly for 4 to 5 hours and, thus, had sufficient opportunity to observe them. This is not a case like cases of theft, robbery or dacoity wherein unguarded witness has minimal opportunity to observe the accused. After apprehension of the accused persons, he has accompanied PWs.1 & 2 to

the location allegedly pointed out by one of the accused persons. He had also reached Police Station with them and after completing all the formalities including recording of his statement, he was discharged at about 5-30 a.m. Thus, he had sufficient opportunity of a long duration to observe the accused persons and it was not too long in terms of number of days that he was required to identify them from the witness box. We are, therefore, not inclined to accept the submission that evidence of Chhotelal, in the absence of test identification parade, needs to be rejected so far as identification of the accused persons by him from the witness box is concerned.

. An exception was raised to reading of Chemical Analyser's report relating to blood grouping of the accused persons (Exhibits 48, 50, 52 and 54). This is because neither of the investigating officers, although as many as 5 Police officers from Malad Police Station are examined as PWs.23 to 27, has deposed from the box that he had referred the accused persons to any medical officer for withdrawal of blood, for the purpose of determination of their blood group. The lacuna has remained on record, but taking into consideration the natural course of human conduct, the exception is

required to be ignored. It is well-known that blood group of the accused is required to be determined in order to eliminate the possibility of blood stains found on the clothes of the accused being of his own. On reference to reports in question, it is evident that Chemical Analyser has received the blood samples in sealed phials labelled with the names of respective accused persons. This should suffice the reliability of the analyser's report. It can not be perceived that the investigating officer, instead of arranging the withdrawal and despatch of the blood of accused for grouping purpose, would send blood of someone else without referring the accused persons to medical officer for that purpose. In playing such a hypothetical mischief, he runs a risk of sending unknown blood which in its grouping may mismatch with the blood group of the victim and make the value of analyser's report nugatory. If this hypothetical probability is taken into consideration, there is no likelihood of any mischief in sending the blood of the accused persons for grouping and that is why we are of the view that this omission on the part of investigating officers while rendering oral evidence is required to be ignored.

. Considerable importance was given by the counsel

for appellants to the mess about wrappers of the articles before the Court and signatures of panchas thereon. From the discussion by learned Judge in paras 50 and 51, it seems that the learned defence counsel before the trial Court had convinced the trial Court that the wrappers around the articles bear the signature of panch witness, who was not witness to drawing of the panchanama under which the articles were seized. We are not required to refer to the wrappers in order to repel this argument based upon the confusion about the article seized, the panchanama under which it is seized and signature on the wrapper of a person, who is not a witness to that panchanama, but to some other panchanama. On reference to forwarding letter (Exh.45) addressed to forensic science laboratory, it is evident that the articles recovered at the spot of occurrence vide panchanama (Exh.42), the clothes of accused persons seized under panchanama (Exh.37) and clothes of the victim seized under inquest (Exh.40) were forwarded together to forensic science laboratory under one covering letter. The mismatching of the wrappers and the articles that was demonstrated to the trial Court was the status of the articles and wrappers as on the date of recording evidence. The wrappers put at the time of panchanama must have been removed by analyser

for the purpose of analysis. The mess only demonstrates that while collecting the Muddemal from the laboratory after analysis, care has not been taken to ensure that each article was again wrapped in the same wrapper in which it was despatched to and received by forensic science laboratory. From paras 51 and 52 of the judgment, it can not be perceived that the mismatched wrappers were also bearing description of the article. Therefore, it is not possible to draw an inference that Police have obtained signatures of any panchas on any wrappers and, therefore, the work of preparation of wrappers must have been done some time subsequently. There are two hypothetical situations which negate such a possibility. This will require second attendance of the panch witness at the Police Station, although spot panchanama and inquest were drawn at location and Bhagwati Hospital respectively. Secondly, if Police were trying to show the sealing process by manipulation after preparing the wrappers at the Police Station, a manipulator takes better care than routine and mess, if any, would have been meticulously avoided. In any case, the positions of the wrappers and contents being not the same as at the time of drawing panchanama, as noticed while recording evidence, therefore, can not be given any importance. On reference to Exhibits 37, 40 and 42,

atleast Exhibits 40 and 42 certainly record that the articles seized were sealed on the spot. The clothes were seized at the Police Station and although Exhibit 37 does not bear categorical recital that articles were sealed on the spot, that need not be looked with suspicion. However, to this aspect, we shall again advert when we shall deal with the specific challenge to accepting of chemical analyser's reports.

. Although cause of the death by stab injuries is not much disputed by the defence in the light of inquest (Exhibit 40), evidence of Dr.Kachare (PW 22) and post mortem notes (Exh.60), learned counsel for the appellants have placed reliance upon opinion expressed by the medical officer regarding time of death. In para 10, Dr.Kachare stated, "The time of death may be 24 hours prior to body is received by our Mortuary Assistant." As per post mortem notes, the dead body was received by mortuary on 21.8.1997 at 13-30 hours. Thus, learned counsel for the appellants submitted that the death must have ensued prior to 15-30 hours of 20.8.1997, which does not match with the contention of the prosecution that victim was discovered at the instance of accused persons on 20.8.1997 at 23-45 hours. We believe that the opinion of the medical officer

regarding time of the death is not appropriately worded. In all probability, the medical officer desired to express that the death occurred within 24 hours prior to receipt of dead body by the mortuary and not beyond 24 hours prior to receipt of the dead body. Unfortunately, the deposition of the medical officer is loosely worded. Presuming for the sake of argument that doctor has so expressed as interpreted by the learned counsel for appellants, the expression of the medical officer is an opinion and not, strictly speaking, the evidence. If the death had ensued some time prior to 15-30 hours of 20.8.1997, the victim would be lying by the road side, which fact is not disputed by the defence. The dead body could have been discovered much earlier on the streets of Bombay, which are heavily crowded during the day time. Hence, the medical opinion regarding time of death, although does not match the ocular evidence is not sufficient to challenge the ocular evidence to such an extent that an inference can be drawn of prosecution attempting to show the death at some different hours than real time.

. It was submitted by learned counsel for the appellants that the trial Court has not upheld the theory of conspiracy propounded by the prosecution and

if that be so, the prosecution does not have any "motive" on record. It is true that trial Court found the evidence of PW 7 Ajay David and PW 15 Rajeshkumar to be inadequate to prove the conspiracy. We may not hesitate to say that evidence of these two witnesses regarding conduct of Anupkumar Das, his eagerness to meet Rajiv even by delaying his dinner, his questioning Raju _____ as reflected from the depositions of these two witnesses together with discovery of cash Rs.1,00,000/- from the possession of accused no.1, were capable of possibility of other view. Probably because of death of Anupkumar, who was also recited as co-accused in the case, the trial Court has given somewhat light hearted treatment to this aspect. The learned counsel for the appellants can not be faulted with when they submit that prosecution is not aided with proof of "motive", once the conspiracy is held not proved (and prosecution has not challenged the negative finding of the trial Court on the issue of conspiracy). However, it is settled position that proof of motive, although strengthens the cases based on circumstantial evidence, absence of proof of motive, does not necessarily result into failure of the prosecution. The prosecution case will have to be weighed on its own merits, even in the absence of proof

regarding "motive".

9. Some of the lapses on the part of investigating agency are discussed in the minor points hereinabove and some may be dealt with while dealing with more specific challenges by the learned counsel for appellants to the oral dying declaration, FIR, time of arrest and analyser’s report. Learned APP has tried to meet this challenge by placing reliance upon couple of reported judgments of the Supreme Court.

. In the matter of Dhanaj Singh V/s State of Punjab (2004 AIR SCW, 1609), the Supreme Court observed in para 5 as follows:

> "In the case of a defective investigation, the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so, would tantamount to playing into the hands of investigating officer if the investigation is designedly defective."

. Similar view is expressed by Hon’ble Apex Court

in the matter of State of Karnataka V/s K. Yarappa Reddy (2000 ALL MR (Cri), 348) while setting aside the acquittal of the accused as recorded by the High Court and restoring the conviction as passed by the trial Court on the respondent,

> "It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case can not be allowed to depend solely on the probity of investigation. It is well nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it, otherwise criminal trial will plummet to the level of investigating officer ruling the roost. The Court may have predominance and pre-eminance in criminal trials over the action taken by the investigating officers. Criminal justice should not be made the casualty for the wrongs committed by the investigating officers in the case. In other words, if the Court is convinced that the testimony of a witness to the occurrence is true, the Court is put free to act

on it, albeit investigating officer's suspicious role in the case." (Emphasis supplied).

. Now-a-days apathy of the witnesses to render assistance to the criminal justice system is not the only obstacle, but not only lapses due to negligence even deliberate mischief by investigating officers are not far and few. Consequently, while dealing with either the lapses or the negligence or the possible mischief by the investigating agency, if apparent on record, the Court will have to be more circumspect, Courts will have to look to the matter by eliminating the ill effects of such omissions or mischief and then arrive at its own conclusions. In order to judge whether omission on the part of investigating agency creates doubts about reliability of the prosecution evidence or any mischief by commission and omission is aimed at either framing the accused or making a room for his escape, Courts would be justified in depending and placing safe reliance upon common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. We are referring to Section 114 of Indian Evidence Act, which enables the Courts to presume the existence of any fact, which it thinks likely to have happened having

regard to above factors. Witnesses can tell lies or can be made to tell lies. Documents containing falsehood can be presented in evidence, but the circumstances, common course of natural events, human conduct and public / private business seldom misguide the Courts. Illustrations below Section 115 are illustrative and not exhaustive. Courts shall always have liberty to draw reasonable and safe presumption on the basis of factors referred in the said provision of Indian Evidence Act and these factors may provide a tool to segregate ill effects either of negligence or mischief, if any, on the part of investigating agency.

. In this context, we may usefully refer to observations of the Hon’ble Supreme Court in the matter of State Govt. of NCT of Delhi V/s Sunil & another [(2001) 1 Supreme Court Cases, 652] and more particularly observations in para 21 of the same:

> "We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also

knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence, when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused, it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other

> independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions." (Emphasis supplied).

. As a result of the view expressed in the matter of State V/s Sunil above, the infirmities in the evidence of panch witnesses, atleast, can be ignored if the panchanama proceedings are duly supported by respective investigating officers responsible for drawing the respective panchanamas. PW 18 Sangita is criticised because she is a female panch available at odd hours to the Police. Admittedly, she had come in search of her drunkard brother, who was missing and she was required to approach the Police frequently for such search. Panch Nadar was criticised because he faulted by saying that samples of blood scrappings were taken in bottles, although in fact samples were taken on tissue papers.

10. We may state here itself that there are some

natural circumstances on record, which make some of the claims of the prosecution "not unworthy of belief".

. It is claimed by the prosecution that all four accused were apprehended by prosecution witnesses 1 & 2 namely Amroj and Chandrakant - the driver and the gunman, who were on their way return to Police Station, Malad, after reaching senior Police Inspector to his residence. In supporting their plea of total denial, all accused have claimed that they are apprehended from their residence, early in the morning on 21.8.1997, although the clock hours narrated by each accused are different, ranging from 6 a.m. to 8 a.m. The defence has not been able to suggest any reason such as previous acquaintance and clash with the Police authorities with Malad Police Station, as to why these four persons should be picked up by the Police from four different families and four different addresses. As can be seen from the statements u/s 313 of Cr.P.C., accused nos.1,2,3 & 4 are aged 36, 22, 18 & 18 years; no.1 is resident of Jogeshwari and she is a grown up matured woman, accused nos.2 to 4 belong to same age group and atleast 3 & 4 can be said to be adolescents. Although all three of them come from Andheri (E), three of them come from two different localities i.e. Dindayal

Upadhyaya Nagar and Sai Bhagwan Nagar. Why Police should tie together these four individuals from four different families and three different localities can not be imagined on the basis of any hypothesis, more so in the absence of any claim regarding any acquaintance or clash with the Police authorities in the past. In this context, it must be remembered that apprehension of accused persons at odd 23-45 hours is deposed to not only by two Police witnesses Amroj and Chandrakant, but such a claim is supported by rickshaw driver Chhotelal (PW 3) and if Chhotelal is worthy of belief, the prosecution story will have to be accepted thereby causing failure of the defence claim that all four accused were rounded up by Police in the early morning hours of 21.8.1997.

. We feel justified in taking into consideration a hypothesis that not too much time had lapsed between the death just before midnight between 20th and 21st August, 1997 and morning hours of 21st August, 1997, by the time of arrests (if those are presumed to be in the early morning hours of 21st August, 1997). Thus, this was not a case, which had remained unresolved on the part of investigating agency for a considerable time and the

Police machinery was under pressure due to publicity in the press. Publicity in the press to non detection of a murder can be one reason for Police to react with rough and reckless attitude. Present one was not one such case that in order to shut the criticism of the press, Police could have effected indiscreet arrests and then persisted in framing the arrested persons. Therefore, as a natural course of human conduct, the prosecution claim of arrest at 23-45 hours on 20.8.1997 will have to be considered more weighty than the defence theory of early morning round up on 21.8.1997.

. Discovery of hard cash Rs.1,00,000/- from the custody of accused no.1 and at the instance of information given by accused no.1 is another such event. The huge amount discovered could not have been planted by the Police from their own pocket for the purpose of resolving the murder mystery by false evidence. Who could have financed the Police so heavily ? Anupkumar was impleaded as co-accused and it can not be imagined that he could have provided this finance so as to ensure conviction of these four accused for his safety. Conviction of these four accused could have boomeranged upon him also. The magnitude of the amount itself is, therefore, guarantee against plantation or creation of

false evidence by the same.

. Reliance placed upon the observations of another Division Bench of this High Court in the matter of Haribhau V/s State of Maharashtra (2002 ALL MR (Cri), 305), by Advocate Shri Shetty for accused no.1 is, therefore, of no assistance to the appellant - accused no.1 in the matter at hands. Although it was observed by that Division Bench that evidence of recovery can not be relied upon because the recovery memo did not bear the signature of the accused at whose instance the article was said to have been recovered. The recovery in the reported matter was of a knife, which was otherwise a valueless article. The confessional statements by the accused to the Police persons are admissible u/s 27 of the Indian Evidence Act on the basis of principle of confirmation by subsequent discovery. In the matter at hands, the article discovered is so costly that it rules out possibility of plantation in an attempt to show discovery at the instance of accused.

. By placing reliance upon the judgment of the Supreme Court in the matter of Jackaran Singh V/s State of Punjab (AIR 1995 SC, 2345), such observations were

made by this High Court in the matter of Haribhau (supra). On reference to facts in the case of Jackaran Singh, it is evident that discovery evidence was disbelieved not merely because of absence of the signatures or thumb impression of accused on the disclosure statement (although it was observed that such absence materially detracts from the authenticity and reliability of disclosure statement), but also because prosecution had not examined either of the two panch witnesses. In addition, claim of the prosecution that appellant was arrested on 23.6.1984 was doubtful in view of statement of PW 4, who had seen the appellant in the Police Station much prior to 23.6.1984. Consequently, the claim that accused was arrested on 23.6.1984 and laid to the recovery of revolver and cartridges pursuant to disclosure statement was held to be suspect. We do not think that observations in Jackaran Singh lay down a ratio in favour of discarding discovery u/s 27 on the sole ground of absence of signature or thumb impression of accused on the memorandum.

11. Having been taken through the entire evidence by the three lawyers, once as a whole and then again as and when necessary to support their submissions, we feel that evidence of PW 3 Chhotelal Warma is a valuable

piece of evidence for prosecution. In the various challenges placed before us by learned counsel for the appellants, there was practically no challenge to the evidence of Chhotelal, although there is an attempt to suggest that he can be a witness under the thumb of Police or he may be telling lies. The evidence of Chhotelal is always going to be a thorn in the flesh of the defence. To claim that he is deposing false, defence has not been able to offer any reason, by a suggestion of even a remote cause, during his cross examination. He is not a person, who had ever come in contact with the accused persons except at the alleged place and time. He has no enmity, hatred or specific reason to help Police falsely implicate the accused persons. The attempt to demonstrate that he can be a witness under the thumb of the Police, in our opinion, is sufficiently frustrated by the details furnished by the witness in response to the cross examination. We feel that some excerpts from his deposition ought to be usefully reproduced for ready reference. We quote:

> On 20.8.1997 at about 11-45 p.m., I was proceeding to Goregaon side after dropping passengers near Malwani Chowk, while I was at link road near Kachpada Zopadpatti. I had

stopped my vehicle to a side and alighted for attending nature's (urination) call and thereafter I boarded at driving seat of my rickshaw. At such time, 3 boys and one lady came and boarded my rickshaw and directed me to proceed ahead. I told them, to entertain only 3 passengers and they were 4 persons. Due to this, there was conversation with them for 4 to 5 minutes. One police vehicle came and stopped in front of my rickshaw, stopping further movement of my rickshaw. In the said Police vehicle, there were two Police personnel, one was driver while other was armed with gun. Police persons directed all the 4 persons / passengers to alight from rickshaw, which was complied by those 4 persons. On the clothes of those 4 persons, there were blood stains, the Police asked them _____ One of the 3 boys told Police that they stabbed one person at nearby distance. Police took those 4 persons and me, asked them to point out the place, we were taken in Police vehicle. A red coloured Tata Siera was seen stationary and at the back side thereof one person was seen injured. The

> person injured was trying to make some movements, the Police staff went close to him. I was little away from them. In the mean time, mobile wireless came at the spot and the injured was removed to hospital. I do not know name of the injured."

(Emphasis supplied).

. In para 5, Chhotelal has identified four accused persons as the passengers apprehended by Police on that day. In para 7, he has expressed his inability to identify the clothes of the accused persons worn on the alleged day. During cross examination, he has admitted that prior to plying rickshaw, he was vending in fruits for about 8 years, although he did not possess any licence for that business procured from Municipal Corporation. He admits that Police and Municipal authorities used to prosecute them (he and such other vendors) for vending without requisite licence. on many occasions, their carts and fruits were seized by Police and Municipal authorities. The attempt to show that he can be a person under the thumb of Police turns futile when we refer to last statement in para 8. He states,

"Due to above difficulties, I changed to rickshaw driving."

. He has begun his evidence by claiming that he holds a valid driving licence and he is also having a badge of public conveyance driver. Thus, he is a person, who has switched over to rickshaw plying by obtaining all requisite licences, in order to avoid continued threat of action by Police or Municipal authorities. His statement in para 9 that since last 3 years, he is plying rickshaw of only one owner indicates that atleast for 3 years prior to the alleged incident, he was not under threat of action by Police authorities. His refusal to the accused persons for carrying 4 passengers also indicates that he is a law abiding citizen. No doubt, in para 11, Chhotelal admitted that while recording the statement by Police, he had not narrated about exception taken by him in carrying four passengers. However, this improvement in the deposition is not sufficient to discredit him or to brand him as a witness under the thumb of the police. This objection raised by him, might not have been felt significant either by the maker of the statement or by the officer recording it and, therefore, might have been eliminated. It may be taken into consideration that this isolated

statement itself has no inculpatory value quay accused persons and, therefore, this omission can not be considered to be amounting to a material contradiction. On the contrary, in the subsequent part of cross examination in para 11, defence has backed up the claim of the witness by suggesting that he objected because carrying 4 persons was infringement of rules and Chhotelal readily admitted the suggestion to that effect. It is obtained by the defence on record that initially when 3 persons sat in the rickshaw, he was about to start it, but as the fourth passenger (accused no.1) tried to board the rickshaw, he stopped. We must say that neither this omission nor ignorance on his part that has come on record in paras 12 & 13 of the cross examination about certain landmarks in the locality or even cumulative effect of both, can persuade us to believe Chhotelal to be a lier under the thumb of Police.

. A controversy is raised by the learned counsel for the appellants regarding divergent versions of PW 1 Amroj and PW 3 Chhotelal regarding registration number of the auto rickshaw. In cross examination para 23, complainant Amroj has confirmed the auto rickshaw number to be MH-02/U 5062. In fact, that is the number

recorded in his complaint (Exh.11) as well. As against this, Chhotelal has said that he was plying auto rickshaw registration No.MH-02/U5065. The error was tried to be capitalised by the defence by suggesting to Chhotelal that his rickshaw bearing No.5065 was not at all present at the link road (alleged location) on the alleged night. In fact, after prosecution having examined Chhotelal as a witness, whose statement was also recorded on the same night, the quotation of number 5062 in Exhibit 11, which must be said to be erroneous, which error was carried forward by the complainant during his deposition, is insignificant. The error could have assumed serious proportions had prosecution abstained from examining the rickshaw driver. The Police Officers depose by refreshing their memory on the basis of details reduced to writing when the things are fresh in their memory and that is why Amroj must have carried the error in the FIR into his deposition. This discrepancy, in our opinion, does not cause any adverse effect on the merits of the prosecution case. However, if any explanation is required, that can be offered by little imagination by a person speaking Marathi language.

. "62" is pronounced in Marathi as _____

(Basashta), whereas "65" is pronounced in Marathi as _____ (Pasashta). The only difference is of alphabet B and P. If the narration of one person is reduced to writing by other person, error in hearing by the scribe could have caused the error in recording registration number in the FIR. Of course, we find it needless to rely upon this imaginary explanation. We can dispose of the point raised by simply observing that recording of registration number as 5062 instead of 5065 in the FIR was a clerical error, which mistake was carried forward in the deposition by complainant Amroj. The driver of the rickshaw having entered the witness box and having offered himself for cross examination, the discrepancy causes no damage to prosecution case.

. We have already indicated in the earlier part of this paragraph that we are inclined to accept Chhotelal as a truthful witness inspite of one minor improvement, an omission, which does not amount to contradiction. Coming back to certain natural circumstances, which make some of the claims of prosecution "not unworthy of belief", the deposition of Chhotelal gives a clue as to why one of the three boys might have led the Police to the location where victim was breathing his last. Chhotelal has confirmed that all the four passengers

were desirous of travelling together in his rickshaw. He has also deposed that all four were having clothes stained with blood. Chhotelal did not hesitate to narrate what rough treatment was offered to the accused persons by the Police. The accused persons were confronted with couple of Policemen including one armed with a gun and welcoming the accused with an abuse (_____), they were questioned in a somewhat threatening language as to what they had done. One is not required to stretch imagination. Three boys were aged 22, 18 and 18 years. Having been caught by the Police immediately after commission of the offence and proverbially red-handed because they were still wearing the blood stained clothes, the weak link of the three, crumbled under psychological pressure. In the light of convincing version of Chhotelal, the story of one of the boys getting frightened by the aggressive mood of Policemen and making a full disclosure, is not an improbability or unworthy of belief type story.

12. In harmony with their only defence that they are falsely implicated and that they were hauled up from their respective residences in the early morning hours of 21.8.1997, learned counsel for appellants have challenged the claim of the prosecution that accused

were arrested at about midnight hours of the night between 20th and 21st August, 1997. For the purpose, the learned counsel together have raised following propositions.

. PWs 1 & 2 are in conflict as to when accused were arrested. Prosecution has not produced any documentary evidence regarding the arrest, such as arrest panchanama or diary regarding entries about the arrest. It is also contended that since none of the three witnesses namely Amroj, Chandrakant or Chhotelal name the accused, who had shown the victim and location of occurrence to the Police, the story of apprehension of accused at midnight hours is not reliable.

. On referring to the depositions of PW 1 Amroj and PW 2 Chandrakant, it is evident that their versions are not conflicting with each other, but both of them have created identical conflict with their earlier statements regarding the time of arrest of the accused persons. In para 8 (chief examination), Amroj has deposed "I came with the four persons (the accused) and the rickshaw driver to Police Station". Eventually, this is deviation from his narration in the FIR. In FIR (Exh.11), complainant has said that after he gave

message on wireless set to the control room, Malad wireless Mobile I arrived there and injured was carried to Bhagwati Hospital. In the meanwhile, officers of Malad Police Station reached the spot and accused were handed over to them. The defence counsel had tried to wake up Amroj by confronting him these contents from FIR during cross examination (para 21) when Amroj has denied to have made statement as marked A in the FIR. Like Amroj, PW 2 Chandrakant in his deposition para 5 (chief examination) narrated that he alongwith PW 1 Amroj came with the accused persons to Malad Police Station and accused persons were handed over to Station House Hawaldar. In his cross examination (paras 8 & 9), he was confronted with his statement as recorded by Police and more particularly the contents to the effect that officers from Malad Police Station reached the spot and accused were handed over to them. In fact, in para 8 chandrakant denied a suggestion to that effect, but when he was confronted with contents to that effect from his Police statement (portion marked A), he tried to escape by saying, "I do not recollect .....". In the cross examination of PSI Ashok Wanjale (PW 3) - paras 32 and 33, these portions contradicted by both the witnesses were got proved. Thus, it is evident that both these witnesses in conflict with their earlier statements

before the Police, that they had handed over the accused persons to the officers from Malad Police Station, when the officers reached the location have deposed that they returned to Police Station with the accused persons. When we refer to deposition of Chhotelal in para 10 (cross examination), he has said that police persons took him and the four accused persons in the Police vehicle at around 11-45 to 12 midnight to the spot, while rickshaw remained at the initial stage. According to him, he was taken to Police Station from the spot where the injured was found after process of panchanama. He was taken alongwith the accused persons and they reached Police Station at 00-15 hours. When we refer to deposition of PW 23 Wanjale, when he reached the spot, he learnt that the injured was already removed to hospital in Malad Mobile I and the accused persons were taken to Malad Police Station by Peter I Mobile. If the depositions of PSI Wanjale and PW 3 Chhotelal are taken into account, it appears that the deposition of complainant Amroj and PW 2 Chandrakant to the effect that they had taken the accused persons to Police Station appears to be correct and the narration in the FIR of Police statement appears to be wrong. The variance appears to have come on record obviously because all the versions as to when and how accused

persons were shifted from the location to the Police Station have come without reference to documents reduced to writing. In any case, both the statements do not conflict with apprehension of the accused persons at midnight hours and such a version is supported by deposition of PW 3 Chhotelal. Although the prosecution has not explained this variance, the same is not so weighty as to discard the oral evidence of first three witnesses of the prosecution and more particularly that of PW 3 Chhotelal that accused persons were apprehended at about midnight hours.

. The lacuna has remained on record. It seems that in the hurry of carrying the victim to the hospital, drawing of spot panchanama and seizure of clothes of the accused, nobody has drawn formal panchanama of arrest of accused persons. Panchanama of seizure of the clothes of accused (Exh.37) was drawn at Malad Police Station between 03-00 to 03-20 hours of 21.8.1997 and inspite of confusion on record as to whether PWs 1 & 2 brought the accused persons to Police Station or they were handed over to officers and transported to Police Station in some other vehicle, fact remains that they were available at the Police Station at about 3 a.m.

. We have already indicated that the deposition of PW 3 is felt by us to be quite truthful and safely reliable and, therefore, as laid down by the Apex Court in the matter of State of Karnataka V/s K.Yarappa (referred supra in para 9), the testimony of the reliable witness can be accepted to believe that accused persons were apprehended at about midnight hours, inspite of confusion by PWs 1 & 2. Eventually, for this confusion on the part of PWs 1 & 2, there is no suspicion about mischief on their part.

. As a last attempt, it was pleaded that since all three witnesses only said that one of the three boys blurted out a confessional statement to the policemen and led the policemen and rickshaw driver to the location where victim Rajivkumar was lying, the story of arrest at midnight hours and pointing out of the victim by the accused should be disbelieved. This lacuna has remained on record as a result of lapse on the part of complainant Amroj to ascertain the name of the person making the statement. (It is not that nobody has referred to the name of the accused making a disclosure. The disclosure has come from accused no.2 Laxman, as can be seen from para 5 of the evidence of PW 2 Chandrakant.

However, since this narration of Laxman, as deposed to by PW 2 Chandrakant, has come in the form of a confession and since confession to a Police officer is barred by Section 25 of Indian Evidence Act, we have refused to read the same.)

. Merely because name of the person giving lead to the location where victim was lying was not immediately ascertained, the lacuna has remained on record. However, since the information furnished by the accused stood confirmed by discovery of the victim, the vehicle and couple of weapons, it is needless to look to such evidence with disbelief. We are unable to agree with learned defence counsel that this lacuna can falsify the story regarding arrest at midnight hours or the story regarding one of the accused persons leading the Police to the location. At the cost of repetition, we may say that the story of apprehension of accused and one of them leading the policemen to the location is fully supported by Chhotelal, an independent witness, who is not impeached on that aspect during his cross examination.

. Inspite of the defects discussed hereinabove, we are not inclined to accept the submission on behalf of

appellants that those circumstances shrewd doubts on above two aspects of prosecution story.

13. Learned counsel for the appellants have also taken an exception to read the reports of analyser as reliable piece of evidence. Although Assistant Chemical Analyser Shri Uday Bange (PW 21) was grinded with a searching cross examination, the reliability of the analyser's report is not challenged on the basis of shortcomings of chemical analyser in his technical know-how or by relying upon any defects in the procedure followed by him. It was argued that there is a mess regarding the wrappers and the contents within the wrappers, by wrappers bearing signatures of the persons, who are not panchas to the panchanama of seizure of articles. (We have already dealt with this challenge in para 8 above.) It was urged that there was delay in despatching the articles to forensic science laboratory. It is not demonstrated that the seized articles were kept in secured custody free from possibility of tampering. The seizure of the clothes of the accused persons itself was doubted by pointing out that timings of drawing panchanamas (Exh.37) (regarding seizure of the clothes) and Exhibit 38 (discovery of cash at the instance of accused no.1) are overlapping. Reliance was

also placed upon paras 25 to 27 of the deposition of PW 23 Shri Wanjale for expressing doubts on this aspect of the prosecution case.

. The reports of analysis are important from the point of view of prosecution, because both the knives (articles 3 & 4), all three clothes of the deceased (articles 5,6 & 7) as also saree and blouse of Ushadevi (articles 9 & 10), pant of accused no.2 (article 12), open shirt and pant of accused no.3 (articles 13 and 15) so also open shirt and pant of accused no.4 (articles 16 and 18) are reported to have been stained with human blood. As already pointed out, CA reports at Exhibits 48, 50, 52 and 54 provide finding regarding blood groups of the four accused and it is evident that accused no.2 is the person with the blood group B, nos.1,3 & 4 being of blood groups A, O and A respectively. The reports do contain the dates of forwarding letters and dates of receipt by forensic science laboratory. From Exhibit 46, it is evident that 18 articles, which included clothes of victim, two weapons used by accused and soil from the location were forwarded vide letter dated 2.10.1997 and the same were received by the laboratory on 3.10.1997. Blood samples of the accused persons seem to have been forwarded vide letter dated 30.8.1997, but

received by FSL on 12.9.1997. Blood sample of the victim seems to have been forwarded (according to Exhibit 43) vide forwarding letter dated 23.8.1997, but in fact received on 20.11.1998.

. For the reasons already discussed in para 4 ante, it is impossible to think about investigating machinery being mischievous in tampering the blood samples of accused persons, since such a mischief may run counter productive to the prosecution. Otherwise also, blood samples of the accused persons were despatched on 30.8.1997 i.e. within a week from the date of incident. From the deposition of PW 21 Uday and more particularly contents in paras 14, 16, 17 and 18, it is evident that the phials containing blood samples of the accused were received by CA from Police Surgeon. This should resolve the mystery that was raised by the learned counsel for the appellants by pointing out that it has not come on record as to whom the accused were referred for withdrawal of blood sample.

. There has been some delay in sending 18 articles vide communication dated 2.10.1997, which were received by FSL on 3.10.1997. The reports of analysis by the forensic science laboratory are the reports of certain

Government scientific experts covered by Section 293 of Cr.P.C. and the same can be read in evidence without examination of the expert, although the Court may, if it thinks fit, summon and examine such expert. In the matter at hands, the expert is examined as PW 21. In para 3, PW 21 Uday has said that these 18 items were received by him in sealed conditions, seals were intact and the seals and wrappers were opened at the laboratory. He has deposed that the seals are said to be intact upon comparison with the seal appearing on the forwarding letter, copy of which is at Exhibit 45. As already pointed out, inquest and spot panchanama at Exhibits 40 and 42 incorporate recitals regarding sealing of the articles immediately upon the seizure. Thus, submission of the counsel for appellants that secured sealing of the articles is not demonstrated by the prosecution, is not sustainable to that extent. Certainly panchanama (Exh.37) does not contain a recital that the clothes seized from the accused persons were securedly sealed immediately after seizure. Panchanama (Exh.37) was drawn by PSI Shri Wanjale, as can be seen from his deposition para 7. ON reference to Exhibit 37, it is pertinent to note that the clothes are described with sufficient details regarding the original colour of the clothes and also regarding the location of blood

stains noticed. Exhibit 37 also records that the blood stains were marked by encircling with a black pen. This fact is also asserted by PSI Shri Wanjale. (In fact, in his deposition PSI Wanjale has deposed about packing the wearing apparels of each accused separately and of affixing a slip bearing signatures of himself and panchas over the said packages, although this fact does not find place in the panchanama.) It may not be incorrect to say that the description of the clothes of accused persons as given in the panchanamas was sufficient to identify those clothes on future occasions. Although by reference to cross examination paras 25 to 27, an attempt was made by learned counsel for the appellants to demonstrate that he can not identify the clothes, but this was done on the basis of showing two banians (under garments, which are generally white). Eventually, clothes of Ushadevi can be easily identifiable, even if clothes of all four accused and victim are mixed together. This is because, she is the only female involved in the incident. Eventually, pants of accused nos.2,3 & 4 are of different colours i.e. white with pink shade, ash colour and yellow colour. Similarly, their shirts are of yellow, pink and white colour. Shirt of accused no.2 has a label "Swagat India", shirt of accused no.3 has vertical checks and

shirt of accused no.4 appears to be plain. We feel that there is sufficient insulation within panchanama (Exh.37) against mismatching of the clothes of accused persons inter-se or mixing with other Muddemal property, because of visible distinguishing characters recorded in the panchanama. In fact, from the cross examination para 27 of Shri Wanjale, it seems that the clothes were bearing names of accused persons. Somehow PSI Wanjale was scared with this situation and discovery, and withdrew by saying that he has not put the names. We are unable to appreciate this scare. There had been nothing wrong, if the clothes were put the names of respective accused persons, may be by launderer's ink for the purpose of identification. Suffice it to say that even if not sealed, the clothes of the accused persons were identifiable. Our attention was not invited by learned counsel by summoning the Muddemal articles (clothes) aimed at demonstrating that those are articles with different appearance than as described in panchanama (Exh.37).

. Since the blood sample of the victim was sent to analyser in November, 1998, although forwarding letter is dated 23.8.1997, prosecution could have suffered adverse effect by non determination of blood group of

victim. But clothes of the victim were seized under inquest (Exh.40). In fact, blood sample of the victim also appears to have been taken in a bottle at that time and fortunately for the prosecution, these articles are said to have been securedly sealed in separate wrappers under wax seal. Consequently, the blood group of the victim is determinable on the basis of blood group of the stains on the clothes of victim. The clothes of the victim are identifiable by their description as also the fact that the clothes have tears caused while inflicting blows by sharp weapon. Because of delayed despatch of the blood sample, Exhibit 43 shows that laboratory has failed to determine blood group of blood sample of the deceased. The fact that this bottle of blood sample of the victim is sealed and it was received by the analyser in sealed condition, should be sufficient to rule out any probability of blood sample of the victim being used by the investigating agency for creating blood stains on the clothes of the accused persons. Inquest (Exh.40) was drawn and clothes of the victim and blood of the victim were sealed at Bhagwati Hospital on 21.8.1997 at 01-15 to 02-30 hours, whereas clothes of the accused persons were seized under Exhibit 37 at Police Station on 21.8.1997 between 03-00 to 03-20 hours, when the blood-sample of victim was already sealed.

. A suggestion that Police could have tampered the clothes of the accused persons is an aspersion against the honesty of investigating agency. The learned counsel for the appellants have not directly said so, but the arguments that it is not demonstrated that the clothes of the accused persons were kept in secured non-tamperable condition till despatch and drawing attention towards delay in despatch of the blood sample of the deceased, coupled together, are aimed at such a suggestion. As pointed out, since Exhibit 40 says that bottle containing blood sample of the victim was sealed on the spot, such possibility should stand ruled out. As observed by Hon'ble Apex Court in the matter of NCT of Delhi V/s Sunil (referred in para 9 ante), the Court can not start with the presumption that police records are untrustworthy and as a proposition of law, the presumption should be the other way around i.e. official acts of Police have been regularly performed.

. The discussion hereinabove demonstrates that there is evidence of insulation against tampering of the clothes of the accused persons. In the absence of any clash, conflict or enmity between the Police and accused persons, it is not possible to swallow such an aspersion

against the investigating agency.

. Last but not the least, circumstances never lie or misguide. It is the claim of the prosecution that PW 1 Amroj, who initially obstructed the rickshaw, became more suspicious upon noticing fresh blood stains on the clothes of these four passengers. That versions of PWs 1 to 3 of having noticed such fresh blood stains stands confirmed by subsequent conduct of Amroj and Chandrakant (PWs 1 & 2) as influenced by the said fact. Chhotelal has narrated that Police took an aggressive approach and questioned the accused persons as to what they have done beginning the enquiry with a nasty abuse (_____). PW 1 Amroj himself has not made any secret about this. In para 19 of his evidence, although he initially said that he interrogated one of the persons by taking him on confidence, upon further questioning he has indicated that, he had practically threatened that person by saying that he should not be compelled to adopt third degree methods in order to know the truth about the blood stains. The reaction of PWs 1 and 2 is sufficient to demonstrate that the witnesses having seen fresh blood stains on the clothes of accused persons is reliable narration and if that be so, there was no need for the investigating agency to sprinkle the

blood of the victim from the sample bottle on the clothes of accused persons.

. We are, therefore, of the view that challenge posed to the acceptance of analyser's report by the learned counsel of the appellants fails. The overlapping of the timings of Exhibits 37 and 38 to the extent of 10 minutes i.e. 03-10 to 03-20 a.m. is explained by PSI Wanjale in para 29 of his deposition, which explanation seems to have been found acceptable by the trial Court (para 44 of the judgment). We have no hesitation in agreeing with such a view. Under Exhibit 37, clothes of four accused persons were seized and if the chronology is taken into account, first clothes of accused no.1 Ushadevi were seized. By law of average devoting 5 minutes out of 20 for seizure of her clothes, she could have been free by 03-05 hours and memorandum is commenced at 03-10 hours.

. Mrs.Patil representing accused nos.3 & 4 has relied upon couple of judicial pronouncements of other Division Benches of this High Court in the matters of Tulshiram V/s State of Maharashtra (2000 Criminal Law Journal, 1566) and Ashraf V/s State of Maharashtra (1996 Criminal Law Journal, 3147). Advocate Shri Shetty for

appellant no.1 has placed reliance upon third decision of Bombay High Court in the matter of State of Maharashtra V/s Masan (1978 Criminal Law Reporter (Mah.), 275). All these judgments lay emphasis on the requirement of prompt sealing of the articles seized and those remaining in secured sealed condition till despatch to the forensic science laboratory. The reasonable satisfaction of the requirement is demonstrated by the details discussed hereinabove and, therefore, there is no reason to discard the reports of FSL as unreliable for want of proof of secured preservation of seized articles.

14. The claim of prosecution based upon evidence of PW 1 Amroj and PW 2 Chandrakant that victim identified the four accused persons as assailants is seriously challenged by the appellants by pointing out following circumstances.

. Amroj and Chandrakant are discrepant whether the victim spoke in Marathi or Hindi. Since hospital record on admission registered the case as "unknown" and since PW 4 Mahendrakumar, driver of Malad Mobile I, which carried the victim to hospital, was not instructed about

the identity of the victim by PWs 1 or 2, it was pleaded that the victim must not have spoken anything to complainant Amroj and his companion Chandrakant. Gravity (nature) and number of injuries as reflected from post mortem notes (Exh.60) is also relied upon as a circumstance to draw a possible inference that victim could not have been alive or in a condition to speak / make gestures when complainant Amroj claims to have questioned him. Since wireless message (Exh.77)does not make a reference to the names of accused persons and other wireless message was not produced, it was desired that inference should be drawn that accused were not identified by the victim as claimed by the prosecution.

. Variance between the medical opinion and ocular evidence regarding the time of the death was also relied upon as one of the grounds to challenge the possibility of victim identifying the accused persons as assailants. This aspect is already dealt with by us in para 8 ante and we do not intend to repeat the reasons for which we rejected the submissions advanced on behalf of appellants on that count.

. However, other grounds for challenge raised by the learned counsel for appellants, expressing doubts

about victim being alive or atleast in a condition fit to make a statement or gestures thereby identifying the accused persons can not be lightly brushed aside and those are a bunch of circumstances.

. Amroj in his chief examination (para 5) narrated,

> "I then asked said injured in presence of all the four persons, rickshaw driver and gunner as to who has assaulted him. The said person pointed his finger to Ushadevi, who was then with us to have assaulted him with her associates 3 in number..... The injured disclosed his name as Bhattacharya."

. It is evident that according to Amroj, victim spoke atleast for disclosing his name, which can not be conveyed by gestures and by gesture, he indicated 4 accused persons to be the assailants. In paras 20 & 21, during his cross examination, Amroj said,

> "I had made enquiry with the injured Bhattacharya in Marathi language and he replied in Marathi. And I was able to clearly hear his

answers.

21. I had enquired identity (name) to the injured and on my next question, as to who assaulted him, he pointed his finger in slow speed, to the accused persons to be assailants."

. We can not avoid temptation of recording here itself that for the speech limited to disclosure of name of the speaker, there can be no barrier of the language. Even if Russian tells his name in Russian language, a person, not knowing Russian should be able to know the same.

. PW 2 Chandrakant in his chief examination says,

"We asked him as to who assaulted / stabbed him. He was also asked as to his identity (name). He disclosed his name as Bhattacharya, Rajkumar Bhattacharya. Said Rajkumar pointed his finger to the lady and the 3 persons as the assailants."

. In his cross examination para 12, Chandrakant said,

> "The enquiries with the injured were made by PW 1 D'souza. PW 1 asked questions to the injured in Hindi and injured replied in Hindi. I will not be able to tell what exactly the injured has stated to PW 1."

. Chandrakant has explained that he could not hear the conversation because he was at some distance from the victim when he was being interrogated by PW 1. In fact, if this position is accepted, the contradiction that has crept in because of his answer that D'souza questioned the victim in Hindi as against the claim of D'souza that he spoke in Marathi, can be ignored as erroneous, probably result of over enthusiasm. But this contradiction is not the only ground creating doubts about this enquiry and response of the victim. PW 4 Mahendrakumar was the driver of Malad Mobile I, the vehicle which carried the victim to Bhagwati Hospital, Boriwali. In his chief examination itself, PW 4 states that he learnt about the name of the victim to be Rajkumar Bhattacharya only at the hospital. This fact is further confirmed by his admission in the cross examination that when attending Clerk at the hospital for the purpose of preparing case paper asked him the

name and address of the injured, he pleaded ignorance. PW 4 also admits in the cross examination that when injured was lifted from the spot, nobody present there informed him anything about the identity of the injured. According to PW 4, at the hospital, personal search of the victim was taken by hospital staff and his identity was established by identity card etc. found in his pockets, whereafter, wireless message was flashed that the name of the injured was Rajivkumar Bhattacharya.

. Learned counsel for the appellants were justified in submitting that had PW 1 interrogated the injured and learnt his name, these subsequent events as narrated by PW 4 Mahendrakumar would not have occurred. Evidence of Mahendrakumar is supported by Exhibit 15, which is report of death of patient, issued by Medical Superintendent of the hospital to Malad Police Station. This report can be presumed to be borrowing the details from the case paper and in the report, name of the deceased is recorded as "unknown".

. On reference to post mortem notes at Exhibit 60, it is evident that the victim has suffered as many as 44 injuries and almost all except 6 are either incised wounds or punctured wounds. Reliance was placed by

Advocate Shri Shetty for accused no.1 on observations of the Supreme Court in the matter of Mohar Singh V/s State of Punjab (AIR 1998 S.C., 2912). The Apex Court was considering the dying declaration allegedly made by the deceased to his wife. It was observed, thus, in para 4,

> ".....It appears that the deceased could not have made such a dying declaration in view of number of injuries received by him.
>
> The evidence of Gomati PW 7 is that she reached the place of incident, her husband Duniram was in a position to speak and when she enquired, he gave the names of assailants. However, she admitted that immediately after saying so, her husband had become unconscious."

. No doubt, we do not have, in the reported judgment, detailed description of the nature and number of injuries suffered by the victim in that case. However, the submission of learned counsel for the appellants that a person having suffered 38 stab injuries, in all probability, could not have survived beyond few minutes or atleast could not have been in a position fit to make a statement after passage of some

time since the assault, can not be said to be unreasonable. In this context, deposition of Dr.Kachare may usefully be referred. He admitted that internal injuries mentioned by him were on vital parts of the body and blood level as also blood pressure of the injured might have started getting down. The victim also had a rupture at laryngo tracheal level. In para 13 of his cross examination, medical officer, however, turned down the suggestion of the defence that death can be said to have been caused instantaneously. The trial Court has undertaken a strenuous exercise in paras 25 to 31 of the impugned judgment. He has discussed the medical evidence at length and he has also endeavoured to fix the time of the death on the basis of medical evidence and medical science pertaining to body temperature, its cooling and the factors affecting such cooling process succeeding the death. During the course, he has also relied upon the opinion of medical officer that death could not have been instantaneous. We are afraid, the learned Judge has taken a risk. After all, every science has its own limitations so also the limitations of the person who applies the science in practice. Even the medical officer, although experienced and sincere may not be able to provide an accurate opinion in every case. The attempt on the part

of the Judge to apply the science himself, with due respect, was an exercise not without risk.

. We have on record at Exhibit 77-A a copy of the register, which is an entry pertaining to a wireless message recorded at 23-55 hours. The message is very cryptic and only desires that night Police Inspector should immediately reach Sri Lanka Zopadpatti since one person was severely beaten. We shall come to the controversy regarding whether Exhibit 11 or the wireless message is the FIR and whether there is any suppression on the part of prosecution, when we deal with challenge to Exhibit 11 being FIR. On reference to para 36 of the judgment, it appears that the trial Judge had perused the wireless message dated 20.8.1997 recorded at 23-56 hours, which referred that PW 1 had apprehended 3 persons with blood stained clothes while running away in a rickshaw near Sri Lanka Zopadpatti. Certainly that was a different wireless message than one at Exhibit 77-A. Unfortunately, a copy of that wireless message is not kept by the trial Court on record and our attempt to secure the said entry for perusal was frustrated with the report that the record is destroyed and hence not available, submitted by learned APP on 10.2.2006. The practice followed by the learned Judge was irregular and

undesirable. If he had perused anything, access ought to have been allowed to the defence counsel by instructing him to keep the matter confidential, if necessary. Even if we take into account the text of the message as recorded by the trial Judge in para 36, that also does not make a reference to the name of the victim, which could have supported the claim of the prosecution that victim disclosed his identity.

. As a cumulative effect of all the details discussed hereinabove and in the light of golden rule of criminal law, when the two views are possible, one favourable to the accused should be accepted by the Courts, we must record our disagreement with the finding of the learned trial Judge that victim must have spoken to PWs 1 & 2. There is a strong probability that victim may not be even alive (he was declared dead as soon as he was reached at the hospital) or he could not have been in a condition fit to make a statement. It also must be recorded here that the story of the prosecution to this extent is not supported by PW 3 Chhotelal, although Chhotelal said that victim was just trying to make some movement. We, therefore, may not place reliance upon the claims of the prosecution that victim identified the accused persons as the assailants. In

the light of the view that we are taking, so far as the dying declaration is concerned, it becomes unnecessary to discuss the case law relied upon by learned counsel Shri Bhat for respondent no.2 on the subject.

15. A controversy is raised by the learned counsel for the appellants by referring to Exhibit 11. It is claimed that the same is not FIR. Although a copy of wireless message dated 20.8.1997 at 23-55 hours is produced at Exhibit 77-A, it is claimed that even that is not the first information report. Referring to Exhibit 11 and more particularly the proforma part of it, a triple challenge is raised and it is contended that this is a manufactured document probably written some time later than purported time. It is said that there is overwriting in the column of time for reporting, existence of Raju's name as absconding accused creates doubts about the same and the same is sent to Magistrate belatedly on the fourth day.

. On reference to cross examination of PW 3 PSI Wanjale, he has offered explanation to all these defects in the format part of FIR (Exh.11). We may point out that examination in chief of Shri Wanjale runs into 7

and half pages, whereas his cross examination runs into 20 pages (paper book pages 330 to 349) and in order to demonstrate as to what depth he was subjected to cross examination, we quote his reply in para 37:

> "While examining the dead body, I was standing, however, while writing I used to sit at a stool and used to write the details of injuries in the panchanama (Exh.40)."

. In this context, we may usefully refer to the observations of the Supreme Court in the matter of State of Karnataka V/s K.Yarappa Reddy and more particularly those contained in para 21.

> "Trial Court can not overlook the reality that an investigating officer comes to the Court for giving evidence after conducting investigation in many other cases also in the meanwhile. Evidence giving process should not bog down to memory test of witness. An investigating officer must answer the questions in Court, as far as possible, only with reference to what he had recorded during investigation. Such records are the contemporaneous entries made by him and

> hence for refreshing his memory, it is always advisable, he looks into those records before answering any questions."

. The incidents of testing memory of the witness as the one quoted hereinabove regarding when investigating officer was standing and when he was sitting are not far and few in the lengthy cross examinations.

. About the controversy as to which is FIR whether Exhibit 11 or wireless message, we are inclined to be in agreement with the learned counsel for the appellants. The wireless message, if it communicated / indicated, the occurrence of a cognizable offence, could be treated as FIR. In that case, Exhibit 11, which is statement of PW 1 Amroj would relegate to the status of a statement u/s 161 of Cr.P.C., 1973 and no further adverse effects will be suffered by the prosecution. We were unable to appreciate the harping of the counsel for appellant as to which of the two documents is FIR. Exhibit 77-A says that a person is severely beaten. Even this can be treated as FIR. What was referred by learned trial Judge as reflected in para 36 of the impugned judgment is unfortunately not available to us for perusal.

However, the Judge has recorded, thus, in para 36 :-

> "I have perused the original wireless message dated 20.8.1997 recorded at 23-56 hours. It refers that PW 1 has apprehended 3 persons with blood stained clothes while running away in a rickshaw near Sri Lanka Zopadpatti."

. If that was the wireless message together with Exhibit 77-A received at 23-55 hours, it could have been the FIR. It is settled position that FIR need not be encyclopedic. Even the reproduction of the message, which refers to 3 persons and not 4, possibly could have been used by accused no.1 to claim that she is not referred in the same. But fact remains that the message refers to the rickshaw as the vehicle, which was being used for attempting to run away. The defect, if any, in that wireless message regarding non reference to fourth person (presumably female accused) stands cured by examination of rickshaw driver PW 3 Chhotelal. We have already discussed that Chhotelal is a reliable witness even after taking into consideration his chief examination and one insignificant omission not amounting to contradiction. The deposition of Chhotelal absolves the prosecution of adverse inference that it could have

suffered for non production and non reliance on wireless message as FIR.

. Coming back to the cross examination of PSI Wanjale, in para 28, he has offered the explanation to the reference of absconding accused Raju in the prescribed format part of Exhibit 11, which is not there in the statement of PW 1 Amroj. He has said that Raju being a wanted accused was revealed during the interrogation of accused no.1 and hence it was so written in the format. From memorandum (Exh.38), it is evident that accused no.1 was interrogated some time prior to 3-10 a.m. and, therefore, this explanation is not improbable. Otherwise also, on reference to the format, it can be seen that these details regarding arrest of four accused, one wanted, discovery of two weapons and cause "enmity" are incorporated in the column "result of the case". Although that is not the explanation of PSI Wanjale, a possibility can not be ruled out that column 8 was filled in after these details were learnt during the progress of investigation.

. Regarding overwriting of time 01-05 hours instead of initial time 03-30 hours, while admitting

that there is overwriting, Shri Wanjale has denied the suggestion that he recorded the statement of Amroj at 03-30 hours. He further explained that by mistake, he had recorded 03-30 hours as the time on FIR, which was the time when he made station diary entry and in the same course, he wrote this time in FIR inadvertently. As he realised the mistake (because he had recorded the statement of Amroj at hospital between 00-30 to 01-00 hours), he corrected the timing. We do not think the explanation is improbable or requires to be stretched for any adverse inference. Even if we take into account the adverse inference suggested by the defence counsel in this very para 31 of deposition, that does not damage the prosecution case. It was suggested that statement of Amroj was recorded at 03-30 hours. If that be so, the same cuts across the defence of accused persons that they were arrested some time between 6 a.m. to 8 a.m. of 21.8.1997. Otherwise, there is no reason why Amroj should know the names of all four accused persons even at 03-30 hours. This, on the contrary, lends support to the prosecution claim that the accused were apprehended at midnight hours. We may only remind ourselves that this claim is strongly supported by reliable deposition of PW 3 Chhotelal.

. In para 31, it was also suggested that copy of FIR is sent to the Court of Metropolitan Magistrate only on 25.8.1997. No document seems to have been confronted to Shri Amroj while putting such suggestion, but on reference to Exhibit 69 (a certified copy of FIR obtained from the Court of Additional Chief Metropolitan Magistrate, 24th Court, Boriwali, which is in the file of documents of the trial Court), the column reserved for forwarding endorsement to the Court of Magistrate appears to be blank. However, there is room to believe that some portion below the same has not appeared on the xerox print and on reference to original Exhibit 11, these contents seem to be date 21.8.1997 as the forwarding date. On reference to Exhibit 69, which is filed by Advocate for respondent nos.2 to 4 in the trial Court on 7.12.1998, we do not find any endorsement of the Court of Metropolitan Magistrate, which would throw light on the date on which it was received.

. In the matter of Arjun V/s State of Bihar (1994 S.C.C. (Crim), 1551), Hon'ble Apex Court has laid down the importance of prompt despatch of copy of FIR to the Court of Magistrate and further observed that the delay leads to possible inference of the same being recorded some time later. In the matter of Muniappan V/s State

(1997 (2) Crimes, 340), Division Bench of Madras High Court held the FIR to be fabricated because there was unexplained delay of 15 hours in forwarding a copy to the Magistrate. Of course, there were other grounds for setting aside the conviction such as time of death of the deceased as per medical report was found suspicious and the testimony of eye witnesses suffered from inherent improbabilities.

. Presuming it for the sake of argument that copy of FIR in this case was sent on the fourth day, it can not be forgotten that this was a chance detection of an offence. This is not a case wherein name of accused or witnesses could have been subsequently added and fact that statements of PWs 1 to 3 were recorded on the same day and they were examined in the Court prevents us from drawing any adverse inference due to delay in sending the FIR, if any.

16. It was submitted on behalf of the appellants that trial Court has recorded a negative finding so far as issue of unlawful assembly is concerned and the State has not preferred any appeal against the said adverse finding. It was submitted that since initially prosecution came with a case that the four appellants

together with deceased accused Anupkumar and absconding accused Raju formed an unlawful assembly to eliminate deceased Rajivkumar at the behest of deceased accused Anupkumar. As a result of confirmed negative finding on the issue of unlawful assembly, prosecution is denied support of existence of any motive on record. The arguments were further advanced by claiming that there is no evidence regarding common intention of the four accused. Only two weapons are said to have been recovered at the location and as such there is no account of extent of actual participation by each of the accused. Consequently, it was urged that all accused should be entitled to benefit of doubt.

. To some extent at the cost of repetition, we may say that the charge of unlawful assembly has failed and the reasons for such failure can not be too difficult to imagine. It is evident that Anupkumar had expired before framing of the charge. Naturally evidence , if any, which was only against Anupkumar became irrelevant. Yet the prosecution has persisted in bringing some evidence on record. We are referring to evidence of PW 7 Ajay, the income tax consultant, who was with Anupkumar during entire night of alleged incident and PW 15 Rajeshkumar. From the evidence of these two, the

conduct of Anupkumar has come on record. He was eager to meet his servant Raju (probably, the absconding accused) and for that purpose, he deferred his dinner. In presence of Ajay, he enquired Raju _____ when Raju met them on way to hotel from residence of Anupkumar. If this is linked with discovery of cash Rs.1,00,000/- from the custody of accused no.1, a different view on the issue of unlawful assembly was not impossible. Be that as it may.

. Regarding proof of common intention, both the sides have placed reliance upon reported cases. Shri Bhat on behalf of accused no.2 has referred to the case of Bhaiyan V/s State of U.P. (AIR 1978 S.C., 36) wherein it was observed,

> "In the absence of the evidence showing preconcert between the appellants and the rest of the accused, the fact that appellants also reached the cross roads shortly after the arrival at that place of other accused or that they ran away after the incident, is not sufficient to establish the guilt."

. In the matter of Surya Mani V/s State of Orissa (AIR 1979 S.C., 1534), the learned counsel has practically relied upon finding of fact as recorded by the Supreme Court in that matter and in the light of facts and circumstances of that case, to the effect,

> Even taking these circumstances ex-facie, there is nothing to indicate that the appellants shared common intention to murder the deceased or took any active part in the murder of Yudhishter Behera".

. The findings of fact can not be treated at par with ratio decidendi and, therefore, reliance on the second case was fruitless.

. If we take into consideration the factual matrix of the case at hands, all four accused trying to flee away together is not the only circumstance firmly established against them. They were apprehended with fresh blood stains on the clothes worn by all of them. At the location, two pen knives were recovered. One was on the ground in the gap between the car and the bridge wall. The second was recovered at the driver seat. Both the daggers are reported to have been stained with

human blood of group B, the same as that of the victim. The victim had as many as 44 injuries including 38 stab injuries, which should confirm that both daggers were used and atleast two persons had waged severe attack on the victim. There are blood stains at the driver seat and the victim is lying at a distance of 10 ft. behind the car. This is indicator of the fact that victim must have struggled a lot. The presence of blood stains on the clothes of all should confirm the participation of all in such struggle. We feel that there is enough material on record to presume participation of all four accused persons in the actual incident of assault, although there is no eye witness account of the same.

. On the issue of common intention, learned APP has placed reliance upon the case of Ramesh Singh V/s State of A.P. (2004 AIR SCW, 3682). In this matter, A2 was aggrieved because deceased had prevented him from collecting prayer material for the funeral of his relative. All the accused gathered at the place of incident at 11 O'clock to demand prayer material. A1 and A3 were not concerned with the need of A2 for prayer material, still they had come together with A2. After failing to get the "Samagri" all went to house of accused no.2. Thereafter, all 3 came to the house of

deceased, which act, was held, can not be termed as a normal act because by that time, most of the people including the deceased could be presumed to be sleeping. They had summoned the deceased to come out of the house, which is held to be indicator of some common intention in the second visit. There was also evidence that A2 and A3 held the hands of the victim. It was held that the circumstances clearly indicated that there was prior concert as to the attack on the deceased.

. In the matter at hands, the incident has occurred at odd hours of 11-45 p.m. Accused no.1, who claims to be a house wife, was on the streets and at quite a considerable distance from her residence at Jogeshwari. The four persons from 3 different localities are said to be attempting to flee away together by sharing a common vehicle. Two weapons were used, there is evidence of considerable struggle and there are blood stains on the clothes of all four appellants. We feel that we have evidence not only regarding pre-concert, but also regarding active participation of all four accused. The argument of the counsel for appellants that there is no evidence regarding common intention is, therefore, required to be rejected.

17. In para 10 ante, we have already discussed as to how some circumstances naturally make some of the claims of prosecution "not unworthy of belief". We have discussed that discovery of Rs.1,00,000/- from the custody of accused no.1 is acceptable, even if we discard the evidence of panch witness Sangita and rely upon evidence of PW 25 Chandrakant Bangar PSI, who was the officer responsible for the proceedings of memorandum and discovery u/s 27. While considering the challenge to analyser's report in para 13, we have also found that overlapping of time of 10 minutes regarding proceedings of seizure of clothes of the accused (Exh.37) and discovery u/s 27 (Exh.38) does not make either proceedings doubtful. Having gone through the deposition of Shri Bangar (PW 25) and more particularly the cross examination, although some infirmities such as non-supply of copy of seizure panchanama to accused no.1 have come on record, we are of the view that defence has not been able to bring material sufficient to persuade us to disbelieve the discovery at the instance of accused no.1. It has come in the evidence of Shri Bangar that residence of the accused no.1 from where property was recovered is about 17 to 18 Kms. from Malad Police Station, a distance of about 30 minutes

driving. This situation must be once again taken into account for considering that accused no.1 claiming to be a house wife was 18 Kms. away from her residence at midnight hours. From the description of the address of the residence of accused no.1 as is recorded in Exhibit 38, it can not be said to be house of a rich person. The address is Adarsh Nagar No.1 (near Lokhandwala Complex Room No.38, Jogeshwari (W). We have no hesitation to accept that discovery of cash Rs.1,00,000/- is firmly established by the prosecution through the evidence of PW 25 Chandrakant read with memorandum and panchanama collectively (Exh.38).

. Reliance placed upon the decision of another Division Bench of this High Court in the matter of Devraj V/s State of Maharashtra (1994 Criminal Law Journal, 3602) is without foundation for the same on record. Advocate Mrs.Patil did not rely upon any admission either by panch witness Sangita or by PSI Chandrakant indicating that accused no.1 was handcuffed when she was taken for the purpose of discovery of the cash amount. On going through cross examinations of Sangita (PW 18) and Chandrakant (PW 25), we do not find any such admission. in para 24, it was observed that recoveries made while accused are handcuffed can be said

to be violative of fundamental right enshrined in Article 20 of the Constitution of India. The view that discovery is in breach of Article 20, because accused was handcuffed is a question of fact. This is because the Court finds that since the accused was handcuffed, the discovery can not be said to be voluntary and not the result of duress, threat or pressure by Police authorities. Journey of the accused from the Police Station to the place of discovery by keeping him under handcuffs basically would give rise to a presumption for the same, is a precaution in order to avoid escape. If at all discovery is to be in violation of Article 20, the statement of the accused showing willingness to discover the article should be under threat, promise, inducement, duress etc. If this aspect is taken into account, journey of accused to place of discovery under handcuffs is an event that takes place after the recording of memorandum. If at all such discovery is to be violative of Article 20, the defence must bring on record the details regarding threat, promise, inducement and duress to which the maker of the statement was subjected before recording of the memorandum. The factual finding that because the accused was handcuffed while proceeding to the place of discovery, discovery can not be said to be voluntary, can be differed with.

We are justified in taking such a view in the light of ratio laid down by the Supreme Court in the matter of State of Bombay V/s Kathi Kalu (AIR 1961 Supreme Court, 1808). The Supreme Court has only laid down that if the self incriminatory information has been given by an accused person without any threat, that will not be hit by the provisions of Clause 3 of Article 20 of the Constitution for the reason that there has been no compulsion. The accused being under handcuff during journey from the Police Station to the place of discovery, therefore, need not necessarily be termed as vitiating the discovery as discovery under compulsion.

18. We are aware of the parameters laid down by the Hon’ble the Supreme Court regarding standard of proof in the criminal cases based on circumstantial evidence. The circumstances on which prosecution relies are required to be established firmly, all circumstances together must form a complete chain linking the accused with the guilt and cumulative effect of the circumstances, should leave no other hypothesis possible except that of guilt of the accused. Sharad Birdichand Sarda V/s State of Maharashtra (AIR 1984 Supreme Court, 1622).

. As a result of discussion hereinabove, we are convinced that prosecution has established on record following circumstances by cogent and reliable evidence, which is referred in brief in the brackets:

(1) Apprehension of accused persons at odd hours 23-45 on 20.8.1997 at the alleged place (PWs 1, 2 & 3);

(2) Pointing out location of the victim i.e. place of occurrence by one of the accused persons (PWs 1,2 & 3);

(3) Clothes of accused persons were stained with fresh human blood of group B, the same as that of victim (evidence of PWs 1, 2 & 3, panchanamas Exhibits 37, 40 and 42, evidence of Assistant Chemical Analyser (PW 21) and reports of the analysis (Exhibits 46, 48, 50, 52, 54 and 57);

(4) Attempt to run away collectively (PWs 1, 2 & 3);

(5) Discovery of cash Rs.1,00,000/- at the instance and from the possession of accused

no.1. (evidence of PW 25 PSI Chandrakant and panchanama / memorandum Exh.38).

. Taking into consideration cumulative effect of the circumstances established in the light of definition "proved" as contained in Section 3 of Indian Evidence Act, we have no hesitation to observe that the circumstances leave no other hypothesis open except the four accused having consigned Rajivkumar Bhattacharya to death for monetary considerations.

. **Proved** - a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of particular case, to act upon the supposition that it exists.

. Advocate Shri Bhat for accused no.2 on this aspect has placed reliance on the decision of Bakshish Singh V/s State of Punjab (AIR 1971 Supreme Court, 2016). In this matter, the body was recovered from the river by the Police on the information given by the accused and on the bank of the river, there were broken teeth and parts of human body lying. It was held

anybody, who saw those parts, could have inferred that the dead body must have been thrown into the river near about that place. The accused person even if he was not party to the murder could have come to know the place where the dead body had been thrown. In the matter relied upon by the learned counsel for borrowing the analogy, circumstances (a) to (f) relied upon were different than in the matter at hands. The murder was alleged to have taken place on 13.6.1968. Accused Ram Singh and Tara Singh were arrested on 16.6.1968. Thus, the discovery was atleast 4 days after the murder. Other circumstances relied upon by the prosecution were disbelieved by the trial Court except the discovery. In the matter at hands, discovery is not the only reliable piece of evidence and the discovery, although at open place, at the instance of accused, is so soon after the incident that blood stains on the clothes of accused persons were fresh. The reliance on the reported judgment, therefore, does not persuade us to take a view in favour of the appellants.

19. For the reasons discussed hereinabove, the appeals fail and the same are dismissed by confirming the impugned judgment.

. Original accused nos.1 to 3 are in jail. The Registrar (Judicial) shall furnish a certified copy of this judgment free of cost to each of them through prison authorities.

. Accused no.4 Natwarlal, who is on bail, shall surrender before Principal Judge, City Sessions Court, on any working day on or before 10.3.2006 and on such surrender, the said Sessions Judge shall consign him to prison for undergoing the balance sentence with appropriate conviction warrant, specifically stating therein the period of set off. In case of failure to so surrender, Principal Judge, City Sessions Court, shall issue appropriate warrant for arrest of accused no.4 - Natwarlal and his production before the said Judge, and upon such production, he would be consigned to undergo balance sentence with appropriate conviction warrant as above. Before consigning him to prison, the said Sessions Judge shall furnish him a certified copy of this judgment free of cost.

(Smt.V.K. Tahilramani,J.) **(N.V. Dabholkar, J.)**

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